IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 34

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, EX REL. VIRGINIA STATE BAR,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

PROCEEDINGS RELATIVE TO PETITION FOR REHEARING BY THE COMMONWEALTH OF VIRGINIA EX REL. VIRGINIA STATE BAR.

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE.

FOR THE AMERICAN BAR ASSOCIATION:
WAYLAND B. CHADBOURNE, Chicago, Illinois,
Of Counsel for This Cause.

REHEARING ALSO URGED BY
FORTY-FOUR STATE BAR ASSOCIATIONS AND
FOUR LOCAL BAR ASSOCIATIONS,
LISTED ON INNER COVER PAGE.

Forty-four State Bar Associations and Four Major Local Bar Associations join with the American Bar Association in urging that the Court grant Rehearing.

Alabama State Bar
Alaska Bar Association
State Bar of Arizona
Arkansas Bar Association
State Bar of California
Connecticut Bar Association
Delaware State Bar Association
The Florida Bar
Georgia Bar Association
Bar Association of Hawaii
Idaho State Bar
Illinois State Bar Association
The Indiana State Bar Association
The Iowa State Bar Association
The Bar Association of the State of Kansas
Kentucky State Bar Association
Louisiana State Bar Association
Maryland State Bar Association
Massachusetts Bar Association
State Bar of Michigan
Minnesota State Bar
The Missouri Bar Adm. Advisory Comm.
Montana Bar Association
Nebraska State Bar
State Bar of Nevada
Bar Association of the State of New Hampshire
New Jersey State Bar
State Bar of New Mexico
New York State Bar Association

The North Carolina State Bar
State Bar Association of North Dakota
Ohio State Bar Association
Oklahoma Bar Association
Oregon State Bar
Pennsylvania Bar Association
Rhode Island Bar Association
South Carolina Bar Association
The State Bar of South Dakota
Tennessee Bar Association
State Bar of Texas
Vermont Bar Association
The West Virginia State Bar
State Bar of Wisconsin
Wyoming State Bar

Association of the Bar of the City of New York
New York County Lawyers Association
Chicago Bar Association
The Bar Association of District of Columbia

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The American Bar Association seeks to file this Brief, as *Amicus Curiae.*

The Commonwealth of Virginia, Ex Rel. Virginia State Bar, Respondent, has consented to the filing of this Brief, by Stipulation filed herewith. The Brotherhood of Railroad Trainmen, Petitioner, has refused to consent. The American Bar Association has therefore proceeded pur-

suant to Rule 42 (Briefs of *Amicus Curiae*) of the Rules of the Supreme Court, and has filed a Motion for Leave To File This Brief.

Position of American Bar Association.

The American Bar Association respectfully and most strenuously urges that the Court grant Rehearing of its Decision of April 20, 1964.

Position of State and Local Bar Associations.

Forty-four State Bar Associations and Four Major Local Bar Association join with the American Bar Association in urging that the Court grant Rehearing.*

Alabama State Bar
Alaska Bar Association
State Bar of Arizona
Arkansas Bar Association
State Bar of California
Connecticut Bar Association
Delaware State Bar Association
The Florida Bar
Georgia Bar Association
Bar Association of Hawaii
Idaho State Bar
Illinois State Bar Association
The Indiana State Bar Association
The Iowa State Bar Association
The Bar Association of the State of Kansas
Kentucky State Bar Association

*The listed State and Local Bar Associations (although not having received or endorsed copies of this Brief, due to shortness of time) unanimously join in urging, as strongly as possible, that this Court grant Rehearing.

Louisiana State Bar Association
Maryland State Bar Association
Massachusetts Bar Association
State Bar of Michigan
Minnesota State Bar
The Missouri Bar
Montana Bar Association
Nebraska State Bar
State Bar of Nevada
Bar Association of the State of New Hampshire
New Jersey State Bar
State Bar of New Mexico
New York State Bar Association
The North Carolina State Bar
State Bar Association of North Dakota
Ohio State Bar Association
Oklahoma Bar Association
Oregon State Bar
Pennsylvania Bar Association
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The State Bar of South Dakota
Tennessee Bar Association
State Bar of Texas
Vermont Bar Association
The West Virginia State Bar
State Bar of Wisconsin
Wyoming State Bar

Association of the Bar of the City of New York
New York County Lawyers Association
Chicago Bar Association
The Bar Association of District of Columbia

POINT ONE.

The Majority Opinion Severely and Unnecessarily Damages the Canons of Professional Ethics, and the Principles of Law Prohibiting the Unauthorized Practice of Law.

The Majority Opinion appears to hold that the Brotherhood Plan (advising Injured Members to obtain legal counsel, and channeling the claims to specific Attorneys) cannot be enjoined, because the same is protected as being within the Constitutional guarantee of Freedom of Speech. This, unless clarified, damages the Canons of Professional Ethics, and the Rules of Law prohibiting the Unauthorized Practice of Law, so severely as to make future enforcement of the Canons and Rules of Law almost impossible.

The Majority Opinion discusses the Injunction Decree entered by the Chancery Court of Richmond, Virginia against the Brotherhood of Railroad Trainmen. The Majority then goes on to state:

> ". . . but the Brotherhood objects specifically to the provisions which enjoin it
>
> > '. . . from holding out lawyers selected by it as the only approved lawyers to aid the members or their families; . . . or in any other manner soliciting or encouraging such legal employment of the selected lawyers; . . . and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers . . .'
>
> "The Brotherhood admits that it advises injured members and their dependents to obtain legal advice before making settlement of their claims and that it recommends particular attorneys to handle such claims. The result of the plan, the Brotherhood admits, is to chan-

nel legal employment to the particular lawyers approved by the Brotherhood as legally and morally competent to handle injury claims for members and their families. It is the injunction against this particular practice which the Brotherhood, on behalf of its members, contends denies them rights guaranteed by the First and Fourteenth Amendments. We agree with this contention."

This appears to state that the Brotherhood can solicit cases for specific Attorneys. Solicitation of cases, of course, is directly contrary to the Canons of Professional Ethics throughout the entire United States. It violates Canon 27, which prohibits Solicitation of Cases, and Canon 35, which prohibits dealing with clients through Intermediaries. It violates the entire spirit of the Canons of Ethics, which seek to make the practice of Law not a trade but a profession.

If the Majority Opinion indeed means to permit the Brotherhood and its Attorneys[1] to solicit cases, this will create havoc in the entire area of Professional Ethics.

First, the great majority of the Organized Bar and State Courts do not agree with the Majority Opinion in its observation that the soliciting of cases by the Brotherhood and its Attorneys is a good thing and does not constitute the "chasing" of cases. Indeed, there have been numerous Ethics Proceedings against the Brotherhood Attorneys over the years, including several such Proceedings presently on file or about to be filed. The Brotherhood itself, by entering into many Consent Decrees, has repeatedly admitted that it could not solicit or channel cases. It is astounding that this Court should now characterize the Brotherhood's Soliciting Plan as being entirely proper

1. It is true that the Majority Opinion, as related to the Brotherhood Attorneys, only states that they can "accept employment." However, the Brotherhood Attorneys have regularly solicited in the past and can be counted upon to get the Union to do it for them in the future.

and ethical, when in fact a case-by-case history of the Plan and an examination of cases involving some of its Attorneys discloses unethical conduct warranting censure or disbarment. It is equally astounding that this Court should characterize all Plaintiffs' Attorneys as being sharp practitioners, excepting only the "selected" Brotherhood Attorneys. These observations do not appear to be justified or needed in order to reach the conclusion that the Brotherhood Soliciting Plan is protected as being Freedom of Speech. Suffice that, if that conclusion is intended by the Court, and if it is intended that the Brotherhood and its Attorneys can solicit cases, this will be most difficult, if not almost impossible, for the Bar and the Courts to understand or follow.

It is respectfully submitted that the Majority Opinion perhaps does not go so far, and that indeed it is not necessary for it to go so far. It is submitted that the Constitutional Rights of the Brotherhood are protected by a holding which states simply that the Brotherhood has the right to discuss the claim of Injured Members, including cautions not to sign improvident Releases and the like, and including a recommendation that the Member see an Attorney, or one of several Attorneys, but certainly not recommending a specific Attorney. This will be briefly discussed further at Point Two of this Brief.

The Majority Opinion omits altogether any mention of the efforts of the Organized Bar to see to it that Legal Services are made readily available to the public. The Bar, for instance, has long sponsored Lawyer Reference Plans. Under such Plans, the Bar Association in a Metropolitan Area establishes a Listing of Attorneys who agree to handle specific classes of cases, such as Divorce, Personal Injury and so on, at a modest Fee. These services are available to any person who cannot otherwise find an Attorney and who, because he can afford to pay some Fee, is not eligible

for Legal Aid. These Plans differ completely from the Brotherhood Plan, in that, *while Brotherhood Cases are referred to one specific Attorney in each Railroad "Region," the Lawyer Reference Plan instead includes many Attorneys to whom Cases are referred, in rotation.* The Majority Opinion, by omitting this, fails to put the matter in proper perspective and fails to consider a possible solution to the problems of the Brotherhood Members. The Bar has, in the past, offered to cooperate with the Brotherhood in establishing some such system for Brotherhood Injury Cases; but the Brotherhood prefers its Single-Lawyer-Monopoly and has not been interested.

The Majority Opinion might also have taken note of the monumental and intensive study of this subject by the California State Bar. Starting with a "Legal Aid Plan" proposed by a Restaurant Workers Union in Los Angeles in 1958, the California Bar has had three Special Committees report on the matter under the heading, "Group Legal Services"; and at this very moment the California Bar has been negotiating for a $400,000 Foundation grant to study the many problems.

It is probable that the existing information on Lawyer Reference Plans across the United States, and the Group Legal Service Studies in California, would not only put matters in perspective but would also suggest solutions to the problems of Brotherhood Members, "without tearing down the standards of the legal profession." (See In re *Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N. E. 2d 163, 1957.)

Second, if the Brotherhood and its Attorneys are to be permitted to solicit cases, what of all those who likewise want to solicit cases? Where are the lines to be drawn? The Majority Opinion furnishes no clear guide-lines whatsoever. Is this "Right to Solicit" supposed to be available to *any* Labor Union and its Attorneys? Can a Labor Union and its Attorneys "solicit" only those causes of

action arising under Federal Statutes? Or can they also "solicit" causes of action arising under State Statutes?[1] Is the "Right to Solicit" available to the Non-Profit Lay Groups and their Attorneys? Is the "Right to Solicit" available to Corporations organized for Profit?

It is critically important that the Organized Bar have udequate guide-lines as regards the Canons of Professional Ethics and as regards the Rules of Law prohibiting the Unauthorized Practice of Law. There are hundreds of Ethics Cases pending in the several States. There are countless "chasers" waiting for a chance to capitalize on Personal Injury Cases. There are thousands of Lay Groups waiting for an opportunity to advertise "Free Legal Advise" or "Low Cost Legal Advice" as a means of increasing their commercial profits. These areas, as any practicing lawyer knows, are the critical and sensitive areas where choices and decisions are made which make our calling either a Trade or a Profession. These areas have traditionally been areas of concern for the Supreme Courts of each State, as part of their power to regulate the practice of law. What will happen if substantial question is now raised as to the power of the State Courts and the Bar Associations to enforce the Canons of Ethics as regards conduct of Lawyers charged with Soliciting? Or their power to prohibit Lay Groups from capitalizing on the services of Lawyers?

One inevitable result will be that the Canons of Ethics, as regards Soliciting and Lay Intermediaries, will be left in such condition as to be almost unenforceable. This will

1. For instance, the AFL-CIO General Counsel's Office sent out a Memorandum to all its Union Attorneys on April 21, 1964, the day after the Decision in this case. The Memo states that the Decision means that the Union will have no more trouble with the Bar Associations in its efforts to see to it that all work-connected legal matters of Union Members are channeled to the Union Attorneys. Needless to say, the Bar does not agree with this Memo. But where does this stand under this Decision?

happen unless adequate guide-lines are made explicit in this case.

Another inevitable result will be endless disputes in the State Courts, with very numerous appeals to this Court. This is clearly predictable unless the Majority Opinion is clarified so as to provide guide-lines in these very difficult areas.

It is, to repeat, critically important that the organized Bar have adequate guide-lines in this Case, as regards the Canons of Professional Ethics and as regards the effect, if any, of this Decision on the Rules of Law prohibiting the Unauthorized Practice of Law. The Majority Decision does not presently provide any such guide-lines. It is respectfully and most strenuously urged that Rehearing be granted.

If Rehearing is granted, can adequate guide-lines be ascertained and stated?

POINT TWO.

Rehearing Can Avoid the Severe and Unnecessary Damage to the Canons of Professional Ethics, and to the Principles of Law Prohibiting the Unauthorized Practice of Law, Which Damage Is Inherent in the Majority Opinion as It Now Stands.

Rehearing can open up two avenues, whereby the extreme difficulties inherent in the Majority Opinion can be avoided. The first avenue relates to the size and shape of the Brotherhood Plan, as related to the Canons of Ethics. The second avenue relates to the First Amendment guarantee of Freedom of Speech and the manner in which it is applied to the facts of this Case.

First, it is clear that the Majority Opinion has omitted any reference to possible alternative solutions of the

problem, how the Brotherhood can effectively discuss Claims of Injured Members and recommended Attorneys. There is, for instance, no mention of the fact that Lawyer Reference Plans, or some similar Plan, can afford a solution which not only protects the Brotherhood's rights but is also consistent with the Canons of Ethics. Coordination of a Lawyer Reference Plan with the Brotherhood Plan could provide the Injured Member with competent legal service at as reasonable a Fee as is offered by the Brotherhood Attorneys. The Brotherhood Attorneys themselves, if accepted by the Bar Association, could appear on the List of Attorneys for this item under the Lawyer Reference Plan. Those Brotherhood Attorneys who are competent, and in good standing before the Supreme Courts of their respective States, would of course be cleared by the Bar Association and would appear on the List. It is true that they would not enjoy the monopoly they presently have, as regards the Claims of Injured Members; but it is perfectly clear that no Attorney is entitled to be guaranteed this monopoly, under the Canons of Ethics as they are presently understood.

This solution, relating to Lawyer Reference Plans, was not presented to this Court, either in the Briefs, or in the Oral Argument. It would undoubtedly have been presented by the American Bar Association, as Amicus Curiae, in Oral Argument; however, when the American Bar filed its Petition for Leave to have Twenty Minutes Additional Time for Oral Argument, the Petition was denied. In this respect, the Organized Bar has not had its "day in Court," and the Court has not had the benefit of consideration of this possible solution. Rehearing would permit this.

It is possible, even if the Court is unwilling to consider this solution, relating to Lawyer Reference Plans, that Rehearing could avoid the severe damage to the Canons of

Ethics and to the Rules of Law relating to the Unauthorized practice of Law, inherent in the Majority Opinion. The Court can, on Rehearing, specify guide-lines which will serve to make specific the presently general language of the Opinion. It is surely within accepted practice for the Court to state "Caveats" directed against unwarranted extension of the Decision. If this is not done, it is clearly predictable that the Bar Associations and State Courts will be faced with a claim of privilege, relating to alleged Freedom of Speech, in a vast number of cases involving Professional Ethics or involving Unauthorized Practice of Law; and, when this occurs, this Court, having left the matter indefinite in this Decision, will of necessity be faced with the problem of deciding a very great many cases which otherwise need not come before this Court. If Rehearing is not granted, matters of Professional Ethics and Unauthorized practice of Law will be left unresolved until decided by this Court, a most dangerous course to follow, particularly when avoidable. If Rehearing is granted, these guide-lines can be supplied, minimizing the damage and reducing the likelihood of numerous appeals to this Court.

Second, it is respectfully submitted that the Majority Opinion, in holding that the Brotherhood Plan is protected under the First Amendment guarantee of Freedom of Speech, launches the Court on a sea of confusion and uncertainty as regards the scope and meaning of Freedom of Speech vis-a-vis Lay Intermediaries between Attorneys and Clients. The extent of this confusion and uncertainty has just been discussed in the preceding paragraph. It is respectfully submitted that, as a matter of Constitutional Law, such confusion and uncertainty can and should be avoided, particularly in this area, involving, as it does, matters of critical importance to the entire Legal Profession in the United States.

This Case came before this Court largely because of the fact that this Court had recently decided the case of *NAACP* v. *Button*, 371 U. S. 415, 9 L. Ed. 405, 83 S. Ct. 328 (January 14, 1963). The *Button* case held that the NAACP had a protected right of Free Speech as regards effective expression of its political objectives, including the channeling of Civil Rights Cases to specific Attorneys. The Majority Opinion in the present Case states that the same result is required here. It should be clear that this is not so, because, while it may be true that it is necessary to permit the NAACP to channel Civil Rights Cases to specific Attorneys, it is most certainly not true that it is necessary to permit the Brotherhood to Channel Injury Claims to specific Attorneys. The difficulty faced by one whose Civil Rights have been wronged, in seeking out and retaining an Attorney, does not obtain in the case of the Injured Railroad Worker. There are many Attorneys in every City and State who either specialize in the handling of Personal Injury Cases, or who include that practice as part of their General Practice. The only problem faced by the Injured Railroad Worker is the intelligent selection of one attorney, from a large field of competent Counsel, and in this regard the Railroad Worker is no different from any of the rest of us.

Is it not possible for this Court to define some of the concepts involved in Freedom of Speech as applied to Lay Intermediaries between Attorney and Client? For instance, it is not possible, using the discussion in the foregoing paragraph as a starting point, to define "Freedom of Speech" and to define "Related Conduct," including the *Button* case in the former and the *Brotherhood* case in the latter; and with such definitions as tools, to permit no State limitation as regards "Freedom of Speech" but to permit some State limitation of "Related Conduct," de-

pending upon a balancing of considerations. Such definitions would permit this Court to reach a result consistent with the *Button* case, protecting the Brotherhood within reasonable limits, while not damaging the Legal Profession. Such definitions would avoid the uncertainty and confusion, and the likelihood of numerous appeals to this Court, inherent in the Majority Opinion. Rehearing would afford an opportunity to reach such definitions.

CONCLUSION.

The American Bar Association, therefore, respectfully urges the Court that it grant the Petition for Rehearing being filed by the Commonwealth of Virginia Ex Rel. Virginia State Bar, Respondent. The American Bar Association, fully aware of the burdens of this Court, but also aware of the very great needs of the Legal Profession, most solemnly and deliberately urges that Rehearing be granted. In so doing, the American Bar Association is supported by the Forty-Four State Bar Associations and the Four Major Local Bar Associations listed herein.

Respectfully submitted,

For The American Bar Association:
Wayland B. Cedarquist, Chicago, Illinois,
Of Counsel for This Cause.

Wayland B. Cedarquist,
Suite 3000, 33 North La Salle Street,
Chicago 2, Illinois.

Dated: May 11, 1964.

Certificate.

Wayland B. Cedarquist duly admitted to the Bar of this Court, and whose Appearance is on file in this Cause, states, pursuant to Rule 58 (Rehearings) of the Rules of the Supreme Court of the United States, that this Amicus Brief in support of the Petition for Rehearing filed by Commonwealth of Virginia Ex Rel. Virginia State Bar, Respondent is presented in good faith and not for delay, and that the Rehearing, if granted, is restricted to the grounds specified in the Petition for Rehearing and in this Amicus Curiae Brief.

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Wayland B. Cedarquist.

Dated: May 11, 1964.